Injustice at the Tokyo War Crimes Trial

An Honors Thesis (HONRS 499)

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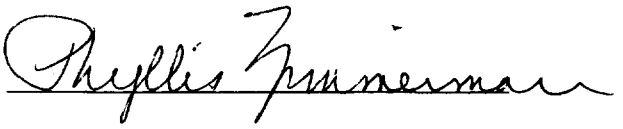

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This paper examines deficiencies in the trial of Japanese war criminals after World War Two. The judges on the bench and the procedures used in the trial were biased against the Japanese defendants. The law on the subject was interpreted by the victor nations with no debate possible from the defense. There were also notable omissions from the list of people indicted. These factors resulted in the punishment of the Japanese but not in justice.

Injustice at the Tokyo War Crimes Trial

For an American, the right to a fair trial is one of the many constitutional safeguards that is taken for granted. This guarantee was not a luxury possessed by the accused Japanese at the International Military Tribunal for the Far East (IMTFE), a tribunal convened to judge the actions of twenty-eight defendants in the war in the Pacific from 1931 to 1945.

At the start of the trial, the Tribunal and the Allies, who took it upon themselves to organize the trial, were lauded for their impoartial and noble effort at providing a fair trial for the defendants. This spirit was, of course, with the expectation that a verdict of guilty on all charges would be the certain outcome. According to the chief prosecutor, Joseph Keenan, the verdict of the trial was less important than the trial proceedings themselve. He says:

> . . . but the prosecution never lost sight of the fact that the goal of punishing the accused was relatively unimportant, when compared with the grander and wider aim of the trial, i.e. to advance the cause of peace and right notions of international law.[1]

It can already be see by Keenan's statement that it WAS important to punish the Japanese, else how would the "cause of peace" have been advanced? This goal could not have been accomplished by acquitting the Japanese on all counts. In the same train of thought, when the question of a fair trial arose, Keenan underscored the fact that the punishment of the guilty is more important than a fair trial for others who might be guilty.

> It was more just to try the present group of defendants, despite the possibility of an unintended miscarriage of justice in the case of one or several, rather than not to try any of them in a judicial proceeding of this nature. Had there been an actual miscarriage of justice with regard to some of the defendants, there would have been no wrong, because it would have been only incidental to the main purpose, namely the punishment of the guilty, and because every reasonable precaution was taken to insure a fair trial for all of the accused.[2]

With this skewed idea of justice, the Tribunal proceeded in a dubious direction.

Despite the facade of justice and fairness, the trial was not fair and was clearly stacked against the defendants. This was demonstrated by several aspects of the trial. The choice of justices was biased and very partial to the prosecution. The rules of the Tribunal were most beneficial to the prosecution. There were porminent Japanese that should have been in the dock, but were excluded. Time and physical considerations severely limited the defense's case. The interpretation of international law was made so that Japan's actions were considered illegal. Aggressive war was deemed illegal and the defense's arguments against this were dismissed. There was no precedent for trying individuals for acts of state. Finally, only acts of the Japanese were under the jurisdiction of the Tribunal.

The discrepancies in the trial will be examined in further detail. As they are, it will be clear that an injustice was done at the Tribunal. It should not be said that Japanese aggression was "justified," but that the Allies did not deal fairly when judging the actions of the Japanese.

The best place to start is with the foundation of the Tribunal, the justices. In most courts the impartiality of the judge and jury, duties which in this case were both carried out by the eleven justices, is the highest concern. Apparently in what President of the Tribunal Sir William Webb considered one of the most important trials of the century[3], that tenet of law was not obeserved. The composition of the Tribunal clearly gave some doubt as to the impartiality of the proceedings.

There was only one justice on the Tribunal that had any experience in international law. That was Justice Radhabinod Pal from India. All of the justices held high court positions in their respective countries, and some were even on the highest courts in their land, yet Pal was also elected one of the joint presidents of the International Law Association before the war, which gave him some credibility in international dealings.[4] No other justice had any notable experience in international law.

The fact that most of the justices had no international experience was a small factor when considering the bias of the Tribunal. ALL of the justices were from the nations of the victorious Allies. There were no justices from neutral countries

or equal representation of the losers, the Japanese. Keenan addressed these two propositions when defending the impartiality of the Tribunal. Considering judges from neutral countries, he simply stated that they may or may not have been impartial and beneficial to the trial. He also rationalized the situation by arguing that the Japanese submitted to the Tribunal by signing the surrender document. As it was, judges from neutral countries would have been equally impartial, and probably more impartial than the judges on the bench. As for the possibility of one or more representatives on the court from Japan, he stated that it would not be possible to find an impartial justice from Japan. He said that despite the fact that a Japanese justice could have been found that was against the war and did not participate, that justice would have a subconscious tendency to give leniency to the defendants simply because they were fellow countrymen who were serving their country.[5] Questions then surface about the justices from the Allied countries. Would not they also have subconscious tendencies, but against the defendants, since their own countrymen were killed in battle? Presumably, the good-intentioned Allied appointees were superior to the Japanese in that respect.

Not only were all the justices from victor nations, a few of the justices had, to varying degrees, conflicts of interest. The most obvious of those was Justice Delfin Jaranilla of the Philippines. Jaranilla was a colonel in the Philippine army. While serving in the Philippines, he was captured and later was part of the infamous Bataan Death March.[6] It cannot be

possible that Jaranilla was an impartial judge, consciously or unconsciouly. In fact, Jaranilla wrote a concurring opinion along with the majority judgment which stated that he thought the penalties were too light and he would have strengthened some sentences of the accused.[7]

There were other justices besides Jaranilla that served in their countries militaries. Major General Myron Cramer, Major General I.M. Zarayanov, and Harvey Northcroft, who were from the U.S., the U.S.S.R., and New Zealand respectively, held positions in their armed forces.[8] After serving in an organization which held the Japanese as enemies and criminals and whose purpose was to wipe them out or push them back, impartiality would be hard to ensure.

Of more serious concern, two justices had worked in the prosecution of war criminals before they sat on the bench at Tokyo. Sir William Webb, the Australian justice, was the chief investigator of Japanese war atrocities committed against Australian troops. General Douglas MacArthur, the Supreme Commander of the Allied Powers under whose jurisdiction the Tribunal fell, was notified of that fact yet decided that it should not disqualify Webb from the Tribunal. Henri Bernard of France was the chief prosecutor of Nazi war criminals in Paris after the liberation of France.[9] Judging from this evidence, the Tribunal does not seem as impartial as it was first purported to be. The character of the justices on the Tribunal, with the exception of Jaranilla, may not have doomed

the defendants at the outset of the trial, but it certainly gave the prosecution a very favorable bench to work with.

The rules of the trial were also beneficial to the prosecution. In Article 13a, the Charter for the Tribunal ordered the justices to "adopt and apply to the greatest possible extent expeditious and non-technical procedure" admitted "any evidence which it deems to have probative value."[10] The Tribunal was afforded great leeway due to this rule, since the bench was the sole arbiter of whether the evidence was pertinent. The Charter also stated in Article 13c(4) that "a diary, letter or other document" including "unsworn statements" were admissable if the Tribunal thought they contained "information relating to the charges."[11]

The environment for the trial severely handicapped the defense, since it allowed the admission of hearsay evidence. The Tribunal allowed testimony or statements to be entered as evidence even if the witness did not see in person the event he or she was testifying about. The rule on admissibility was especially harmful with respect to the admission of diaries. The Harada-Saionji memoirs were a crucial piece of evidence for the prosecution, yet a considerable amount of that document was not first-person knowledge of the writer. In many of the entries, Baron Harada was not present at the meetings that were recorded in the memoirs. Also, several of the entries were recorded long after they occurred, some as long as two months.[12]

Even the contents of the document that Baron Harada witnessed personally were confusing and garbled. Harada's

stenographer took notes in shorthand as Harada dictated them to her. She then transcribed them into Japanese and gave them to Harada to correct. She testified that it was difficult to tell who was "the subject of the sentence and it was also difficult to tell who was saying what," but she did the best she could and wrote it how she thought it should be.[13] The defense objected to the admission of this evidence on several grounds including the stenographer's difficulty in transcribing the memoir, its hearsay nature, its use of rumor and opinions, and the fact that Harada was not present for several entries of the memoir. The Tribunal dismissed those objections and entered portions of the memoir into evidence.[14]

Several other instances of admitting hearsay evidence into court took place throughout the trial. An affidavit from a Mr. Morishima was objected to because the witness did not restrict himself to the facts, but stated opinions and theories. Webb acknowledged, "It certainly should not be in that form but I am afraid we will have to receive it for what probative value it has."[15] When another document was objected to for lack of a date of origin, the Tribunal ruled that "the probative value of a document will have to be considered when we come to review the whole of the evidence."[16]

In other instances, the prosecution was afforded a different interpretation of the rules of admissibility than the defense. On June 29, 1946, the defense asked a witness a question about a document that had not yet been admitted into evidence. The Tribunal held that the document could not be used unless admitted

into evidence at least twenty-four hours earlier. Later in the trial, however, the prosecution did the same thing and the Tribunal allowed it on the grounds that "the very essence of the cross-examination" was "the element of surprise."[17] This ruling also allowed the prosecution to admit the Harada-Saionji memoirs after the defense had presented its case. Normally, only evidence that had been discovered since the prosecution closed its case would be admitted at that point, but the Tribunal allowed it to be entered as evidence even though the prosecution had possession of the memoir from the beginning of the trial.

With the Tribunal allowing for the surprise factor, the defense had very little time to prepare a rebuttal due to the massive amount of material that it had to sort through already. The defense started in a hole from the first day the indictment was read. The prosecution was able to gather evidence for its case soon after the formal surrender on September 2, 1945. The defense was hampered by only being on the case from May 17, 1946, which was a mere two weeks before the prosecution's opening statement. To make the situation worse, the prosecution had one hundred two translators while the defense was only provided with three. A 34:1 ratio was not remotely fair. Defense attorney Floyd Mattice summed up the situation:

> We find that when we talk to Japanese counsel, or through an interpreter to defendants that far more time than the usual time is required. . . . We find that when we go to the various offices to be, what it seems to be known in military circles as

> "processed," it takes about four times as much time as it takes back in our country to do a similar thing.[18]

The defense did not even receive the services of secretaries and stenographers until the first week in June 1946.

Also, due to considerations of time and limited supplies, the prosecution and defense were not required to give full copies of all interrogations, diaries, statements, etc. to the the opposite parties. This was a necessity because of the sheer volume of the evidence presented--the official proceedings were more than forty-five thousand pages long--but this also offered the chance for both sides to obscure relevant evidence. Since the prosecution held or had access to most of the evidence, they stood to benefit most from that situation. The defense even argued that the prosecution was intentionally holding relevant documents, but that notion was rebuked by Webb.[19]

There were also many witnesses who testified in affidavit form without having to confront the accused. To this defense attorney Franklin Warren complained:

> Sir, I know of no foundation in law, I know of no precedent ever having been set which would require an accused to cross-examine a living person upon an affidavit which he previously made under the supervision, under the entire control, of the prosecution but without a single member of the defense being present.[20]

Once again the defense was overruled.

The most glaring abuse of the affidavit ruling was by the Soviet prosecutors. They submitted several affidavits from witnesses that were "dead, were in custody in Moscow, or were 'too ill' to travel to Tokyo," giving the defense no chance for cross-examination. When the defense informed the Tribunal that Grigori Semyonov had been executed within the last three weeks, the Soviet prosecutor waved aside the observation, "In what way the fact that the man had been hanged can attack his credibility is for the tribunal to object, but I don't think that it can be an obstacle to the admission of this affidavit."[21] After another witness which testified by affidavit was found to have been executed by the Soviets, Ben Blakely erupted, "We wish to enter our strong protest to the second example of a deliberate removal of a witness whose testimony was known to be material here," and he went on to call into question the idea of a fair trial for the defendants.[22]

The sentiments of Pal were that these affidavits should not have been used.

> At present I am thinking of that brand of the rule according to which a specific person must be called to the stand, or his assertion will not be taken as evidence. Such an assertion is not to be credited or received as evidence however much the asserter may know, unless he is called and deposes on the stand. WE DID NOT OBSERVE THIS RULE.[23]

The rules of the Charter had already decided this question for the Tribunal and the justices were bound to uphold it.

Justices could also leave the trial for any amount of time, if the need arose, which it did on many occasions. The only stipulation was that a justice should excuse himself from the trial if he felt that he had missed enough of the trial to warrant his dismissal.[24] This procedure definitely hindered the administering of a fair trial. The justices could miss important information in the case, since there was such a mass of evidence being submitted each day, yet still sit on the bench with no repercussion or system for removal from an arbitrary source. No judge would dismiss himself from a case of this magnitude, either.

Another alarming shortcoming of the trial was the omission of notable defendants. The most obvious of these omissions was Emperor Hirohito. To say that the emperor was strictly off limits was an understatement. It seemed as if the one thing in common between the prosecutors and the defendants was that neither wanted to have any questions brought up about the emperor.

The defendants' motives in not bringing the emperor into the trial were simply their loyalty to him and Japan. In Japan, the emperor was revered as a deity. In theory, his commands were the ultimate authority in Japan. Until his historic radio announcement calling for the end of the war, only a very select few had ever heard him speak. When questions delved into the participation of the emperor in the planning of the war, the defendants quickly denied any responsibility of the emperor. In Tojo's testimony, he claimed full responsibility for the

Pacific War and claimed that it was "absolutely not the responsibility of the emperor."[25] The next day, Tojo was commended by the Japanese people for absolving the emperor, and most were relieved that the emperor would not be involved in the trial.

The Allied prosecutors also did not want Hirohito brought into the trial as a witness or a defendant. The peace in occupied Japan was at stake. A couple of the nations represented in the trial made objections to the United States, but General MacArthur had received orders from Washington that no action would be taken against the emperor. The consequences of angering a nation that had recently been devastated in a war by taking away their reigning deity and ruler was too much of a risk to pursue an indictment. At one point after the surrender, Hirohito appeared before MacArthur and offered to take full responsibility for all of the actions taken by the Japanese in the period covered by the indictment. MacArthur could not go against the orders of Washinton, though, and the emperor was denied his request.[26]

During the course of the trial, evidence arose that told of tests of chemical and germ warfare on prisoners of war in Manchuria, but none of the persons responsible for these terrible acts were indicted. When a document detailing the testing of bacteriological weapons was inadvertently admitted into court, then soon forgotten by the prosecution, Webb incredulously asked if further evidence would be entered on that shocking subject. The prosecution quickly squelched this line of questioning and

said no more evidence would be introduced on the subject and no further mention was made of that facet of the war. Later, it was found out that the people in charge of these operations were given immunity if they divulged their secrets to the U.S. In 1982, Justice B.V. Roling of the Netherlands commented on the cover-up:

> As one of the judges in the International Military Tribunal for the Far East, it is a bitter experience for me to be informed now that centrally ordered Japanese war crininality of the most disgusting kind was kept secret from the Court by the U.S. government.[27]

No member of the Kempeitai or zaibatsu was put on trial, either. The Kepeitai was the secret police of Japan during the war and was similar to the Gestapo in Germany. The omission of anyone from the Kempeitai was presumably so secret documents, covering mostly biological technology, would not have to be made public. The zaibatsu were the financiers and industrialists that wholeheartedly supported the war since it was making them rich. The absence of any businessmen at the trial was particularly maddening to the Soviet Union which blamed capitalism and fascism for most problems in the world. The zaibatsu were left out so that there would be a good economic base to start rebuilding the country. Building up the capitalists in the country would also combat any possible communist feelings that were building in Japan.[28]

Another person to escape trial was originally indicted by the Tribunal. Dr. Shumei Okawa was among the twenty-eight defendants slated for trial until he made a scene in the courtroom. He underwent psychiatric testing and was deemed unfit for trial by a committee of psychiatrists, the only dissenting vote being from the Japanese psychiatrist who thought Okawa might be faking it. After a year, Okawas's hallucinations deserted him and he seemed in his right mind. He was examined again, but no copy of that exam was ever found. He stayed in an asylum until the trial was over. His attorneys then asked General MacArthur if any further action was going to be taken against Okawa. MacArthur was glad that the trial was behind him and told Okawa's attorneys that the charges against Okawa had been dropped.[29] A week after Tojo was hanged, Okawa was released. One of Japan's most influential war hawks had gotten off without even having to sit through the trial.

These example just show the contradiction between what was said and what was done by the Allies, though the Potsdam Declaration stated that "Stern justice shall be meted out to all war criminals. . . ."[30] Obviously, the Allies selected a few notable Japanese so that they could make a historic statement.

Just as the justices and procedures were biased against the defendants, the interpretation of international law at the time was also bent against the accused. The defense held that the laws against aggressive war, whether written or customary, were not present at the time. It also argued that individuals

could not be held responsible for acts of state. The majority of the Tribunal felt the opposite was true, while only Justice Pal agreed with the defense.[31]

International law as understood and proclaimed by the Allies was written into the Charter of the Tribunal. The Charter stated, "Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression. . . ."[32] So the Tribunal, which was bound by the Charter, was already obligated to treat aggressive war as a crime depite the arguments of the defense. This was yet another inequity of the trial.

The first problem of the prosecution was defining aggressive war without simply stating that aggressive war was the Japanese attacks on Manchuria, China, Pearl Harbor, and Singapore. In 1936 at a conference in Paris, the International Law Association could not come to an agreement on the definition of aggressive war.[33] Almost any definition can have an exception. If you define "aggressive war" as the first country to physically attack another having initiated an "aggressive war," questions soon arise. Assume there is a situation where country A is massing troops on the border with country B. B then attacks A before A crosses the border with the reasoning that A was going to attack so they were simply acting in self-defense. Yet, according to our previous definition, B was the aggressor. If we define "aggressive war" as the war started by the aggressive moves of one nation, who is to be the judge as to what is an aggressive move? "Aggressive war" is a very ambiguous

term that was never spelled out by the prosecution or the Tribunal. "Perhaps at the present stage of the International Society the word 'aggressors' is essentially 'chameleonic' and may only mean the leaders of the losing party," was Pal's response to the definition of "aggressive war."[34]

The proponents of the idea that aggressive war was a crime pointed to the Pact of Paris in 1928 as their main piece of evidence. This was a treaty signed by more than sixty nations, including Germany and Japan. The relevant part of the Pact reads:

> Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory power which shall hereafter seek to promote its national interest by resort of war, should be denied the benefits furnished by this treaty.[35]

The Pact did not prohibit nations to act in self-defense. This is where a conflict arises, since it was not spelled out what constituted self-defense. Each country was left to its own definition of self-defense.

That last detail is important: each country was left to its own definition of self-defense. The significance of that statement is that there was no consensus of what constituted self-defense and where the line was drawn between that and aggressive war. Frank Kellogg, Secretary of State from 1925 to 1929 and one of the chief negotiators of the treaty for the

U.S., stated in an address to Congress that self-defense was not contained strictly to "defense of territory under the sovereignty of the state concerned."[36] This meant that there were other considerations to be taken into account besides the simple case of one nation physically attacking another. Those considerations may have taken the form of blockades, embargoes, or even veiled threats or preparations for war. IT WAS UP TO EACH NATION TO DECIDE. For all that is known, the leaders of Japan may have believed the propaganda they released that said they were acting not only in self-defense, but also in self-preservation. Pal pointed out that Pearl Harbor must be looked at from the Japanese point of view and in light of the fact that the U.S. was giving China all the possible aid that it could.[37]

The claim of self-defense is not the only factor in the view of the legality of war. The belief that international law was produced by the Pact of Paris was disputed by the defense. The wording of the Pact seems to contradict the notion that it was accepted as international law. If the signatories had wanted to consent to the outlawing of aggressive war, it seems logical that they would have explicitly declared this in the Pact with wording similar to "promoting national interests by resort of war is an international crime." The signatories instead decided to agree that if they did resort to war for national interests, they would be "denied the benefits furnished by this treaty."

Instead of creating international law, the Pact of Paris was, in reality, a contractual agreement, and the law of contracts is completely different than criminal law. Contractual law does not require punishment for breaking of a contract. Rather, it requires the reparations for the damages in breaking the contract, but that was not the object of the Tribunal. Since the Pact formed a contractual obligation and did not form law, the Japanese were not guilty of international crimes for aggressive war under the Pact of Paris.

Two other facts supported the idea that the Pact did not make international law. Kellogg, in his notes with the Pact, stipulated that if one of the signatory nations broke the treaty, the others were released from their obligation as stated in the treaty.[38] Another example was a message given to Congress on September 21, 1939, by President Roosevelt. In that address he asked for repeal of the Neutrality act of 1937, which put an embargo on arms to all belligerents. He wanted to return "to the historic foreign policy of the U.S. based on . . . the age-old doctrine of international law . . . and on the solid footing of real and traditional neutrality" which in his view "recognizes the cause of both parties to the contest as just--that is it avoids all considerations of the merits of the contest."[39] This message shows the President of the U.S. had little regard as to who was "right" in a war. If there indeed was international law in 1939 outlawing war, as the prosecution suggests, it would be imperative that at most the U.S. should aid the aggrieved nation, and at least the U.S.

should not aid the aggressor in its war. Pal says:

> . . . in light of this legislative history of the official attitude of the government of the U.S. toward the interpretations of the Pact, it is impossible to accept the thesis that a war in violation of the Pact was illegal in international law on September 21, 1939.[40]

If the Pact of Paris did not constitute international law, the prosecution argued that the Pact pointed to customary law, which is unwritten but accepted law, making war illegal. There were several problems with that theory. First, if according to the pact, each nation could decide what it deemed self-defense and was then free to exercise their military might, there existed no consensus as to what was considered illegal. For customary law to be recognized, there must be a consensus, and that was obviously not present if there was not even an agreement on a definition of aggression. Kellogg's notion that if one country broke the treaty the rest were released also went against the idea of customary law being present. Pal observed, ". . . and treaties of nonaggression that are flagrantly disregarded when it becomes expedient to do so cannot be relied upon as evidence to prove the EVOLUTION OF AN INTERNATIONAL CUSTOM OUTLAWING AGGRESSION."[41]

For there to be customary law, people must not only be conscious of the law, but they must live by that law. If there was no recongition of the law, the law could not have existed as a customary law. The premise implied that customary law

was not observed at the time and can be shown with several examples. The most obvious of these were the attacks of the Germans and the Japanese, but there were also others. There were hostilities between the Soviet Union and China in 1929. Several years later, Italy invaded Ethiopia and the Soviet Union invaded Finland. Even after the Tribunal supposedly settled the question of the legality or illegality of war, there have been and continue to be wars in large numbers. There was no customary law present at the time of World War Two.

With the Tribunal's assumption that Japan's aggression was indeed illegal, there was also the assumption that individuals could be prosecuted for acts of state. Customary law in this situation can be ruled out since there were no precedents at the time of the trial. Even Kaiser Wilhelm II was not punished personally by the international community for instigating World War One.

There are two reasons individuals were not held responsible for the acts of state before World War Two. First, the head of state is merely acting as the instrument of the people of his country. He is doing the will of the people, and the responsibility of the act is on the people as a whole, not the individual. Without this understanding, there would be no responsibility of the state for any of its actions. On the contrary, all of its actions could be accredited to individuals. The second reason is that punishment or retribution by an aggrieved nation could be easily circumvented by a shrewd nation. If a certain action was thought to be illegal in international

law, the country that was guilty of the wrong could simply take it upon itself to punish one or more scapegoats who were said to be responsible. They could then say that the injustice was settled, thus allowing the nation at fault to escape any penalties such as reparations or embargoes.[42]

At the time, the sovereignty of each nation was the highest authority in disputes. There was no higher government or organization since the United Nations was just being formed. Professor Hans Kelsen of the University of California said:

> If individuals shall be punished for acts which they have performed as acts of state, by a court of another state, or by an international tribunal, the legal basis of the trial, as a rule, must be an international treaty concluded with the state whose acts shall be punished, by which treaty jurisdiction over these individuals is conferred upon the national or international court.[43]

Pal concurred with Kelsen and felt that "acts done while working a national constitution" should not come under the jurisdiction of international law as long as the nation-state was the highest authority in society.[44]

Added to the ruling of law, on the basis of what was accepted at the time, was the pragmatic aspects of the situation. It would be very easy to prosecute the cases of individuals if it was clear which individuals were responsible for each crime. In the Japanese government in the period covered by the indictment, the lines of authority were very confusing.

Every Japanese was supposedly answerable to the emperor, but Hirohito's role in the war remained very obscure. Even when a government position seemed to have the authority to carry out different orders and actions, the reality may have been that another position or person held the power. One would assume that in the Japanese cabinet the premier was the most powerful person, but in several periods before Tojo became the premier the war minister was the most influential person in the cabinet. If the army decided not to appoint a war minister they could prevent the forming of a new government. They could also bring down the current cabinet by telling the war minister to resign. The war minister also had direct access to the emperor. In one exchange at the Tribunal Hugh Helm asked Baron Kijuro Shidehara, "These instructions were issued to General Minami?" Shidehara replied, "The cabinet had no authority to give orders to the war minister," and later "The cabinet was not in a position to discipline either the army in Manchuria or any army anywhere."[45] One of the most powerful men in Japan in the 1930s and early 1940s was Dr. Okawa, yet he held no government office or military rank.

In addition to the confused system of power, there was the fact that extreme pressure was put on people in positions of power who did not fully agree with the war hawks. There were assassinations of two premiers, Osachi Hamaguchi and Tsuyoshi Inukai, and the attempt to assassinate others in power including premiers, generals, and admirals.[46] Many Japanese were personally against the war, but carried out their jobs

without protest because of their sense of duty to their country or fear for their lives.

Another law imposed on the Tribunal by the Charter was that individuals were responsible for acts of state. There is no precedent for the punishment of individuals for acts of state. There is also the practicality of measuring out judgment to those involved. There was no treaty in place stating that individuals could be tried, either. In respect to those facts, the Tribunal erred in holding individuals responsible.

In light of the preceding facts on both aggressive war and individual responsibility for acts of state, the conclusion that the Allies were guilty of enforcing ex post facto law is clear. Ex post facto law is law that was enacted after the fact, but is still applied to the people that committed acts before they were declared illegal. Almost all systems of law did not allow ex post facto legislation, at least in theory. The Soviet system was an exception and will be discussed later.

The Allies made the decision that aggressive war was illegal and stated so in the Charter of the Tribunal. There was debate on the subject in the trial, with at least one justice saying that the Tribunal could judge whether or not the Charter represented international law, but a majority of the Tribunal thought it was obligated to rule according to the Charter that formed it.[47] This ruling was similar to the interpretation of the rules of evidence, yet the injustice was greater when dealing with the question of the legality of war. To retroactively create a law against a nation or individual which

thought its actions to be within the bounds of international law certainly is in the realm of vengeance and not justice.

The same can be said for the prosecution of individuals for starting the war. There were no precedents for this. There were no treaties establishing the responsibility of individuals for acts of war. The Japanese signed the instrument of surrender which included a statement that all war criminals would be punished and the new government of Japan would assist in this process. Keenan used this as an argument that the Japanese agreed to the Tribunal and the interpretations of the law that the Allies had been proclaiming since they decided to prosecute the leaders of the Axis countries.[48] In signing the surrender papers, however, the Japanese were not agreeing to anything more than the stopping of the destruction of their country. Their situation was similar to the bully who twists a kid's arm until the kid hands over his milk money and later the bully argues that the kid willingly gave it to him. The Japanese had no choice. After the first atomic bomb was dropped, Japan was told to stop fighting or their country would "face utter destruction."[49] The surrender of Japan was an unconditional surrender, which means literally no conditions were put on the Allies. The Japanese were under the control of the Allies and would get whatever the grace of the victors allowed. The Japanese did not agree to the trial, the rulings of the Tribunal, or the command of MacArthur as Supreme Commander. Rather, they endured the trial and the occupation of their country.

Another travesty of the trial was that the only people on trial were Japanese. The Charter does not state that only Japanese could be indicted, but the prosecution was run by the Allies and the governments of the eleven nations told their representatives on the prosecution staff whom they wanted charged. The Allies would certainly not indict any of their own people, but the Allies also had an attitude of moral superiority about them. They never considered that they might have broken laws, too. They were the ones fighting on the side of "good" and the Axis powers were on the side of "evil." All of the Allies' acts had been done to stop the violent war machine of Japan, so it made the acts acceptable. Yet several actions taken by the Allies would have been brought before the Tribunal if the Japanese had participated in them.

The examination of the behavior of the Allies is not meant to pardon all of the actions of the Japanese by pointing the finger at someone else. The reason for examining them is to show that the trial was meant as a measure of vengeance and punishment and not as a means to promote justice in the world. If justice was truly sought, there would have been several other nationalities on trial as well, including Americans, Dutch, French, and Russians.

Not only should there have been others on trial, but nations with representatives sitting on the bench would be among the accused. Were those nations then in a position to judge the actions of Japan? Obviously, that would be like the inmates running the asylum, or in this case the prison.

Those cases will be examined in comparison to Japanese actions of the same type. First, Japanese conquest in general, and most blatantly in China, was regarded as imperialist in nature and illegal. The same imperialistic conduct was being perpetrated by the nations of France and the Netherlands at the same time the trial was progressing. The French were fighting for what they claimed was rightfully theirs in Indochina. After the Japanese were defeated, Indochina declared its independence, but the French did not recognize it.[50] Under the conditions specified in the Charter, the French were guilty of an illegal war. The Dutch were also carrying on the same behavior in Indonesia.[51] These two countries had economic interests in these lands and did not want to let them go after they had been forced out by the Japanese, but that argument had similar undertones to reasons for the control of Manchuria by the Japanese.

The notion that the Soviets could sit in judgment over the Japanese for war crimes was deplorable, considering the Soviets' actions during World War TWO. In its dealings strictly with Japan, the Soviet Union did EXACTLY what Japan had done. The Japanese and the Soviets had signed a non-aggression pact that was to expire in April 1946. This was beneficial to both countries because they would not have to worry about another front in the war. The Japanese concentrated on the Chinese and Pacific fronts until the Soviets did not have to worry about the Germans any longer. After the defeat of Germany, the Soviets found it more beneficial to disregard their pact with the

Japanese and declared war on Japan on August 8, 1945. Not only did the Soviet Union break its treaty with Japan, it also ignored pleas by the Japanese for the Soviets, as a neutral party to the war between the U.S. and Japan, to talk to the U.S. about surrender terms.[52] These attempts at establishing a dialogue to end the war could have shortened the conflict. The Soviets abused their position as an intermediary for the Japanese simply because they stood to gain land if they declared war on Japan.

In their dealings with Europe, the Soviet Union's moral foundation is shown to have no foundation at all. First they made a deal with Hitler to split up Poland. They profited from this pact and also from their attack of Finland. Their prize was soon taken away from them when the Germans attacked them. Suddenly, the Soviets were on the side of the Allies, who soon forgot that earlier the Soviets were helping the Germans and had openly moved into Finland and Poland. Soon after the end of the war, the Soviets controlled the eastern half of Europe, which was similar to the puppet regimes in Manchuria.

The Soviet Union was also responsible for indiscriminately getting rid of people in their own country under the disguise of the law. Stalin's purge trials were notorious for their swiftness and harshness. The Soviet Justice Zarayanov complained at the trial, "The major Japanese war criminals will die a natural death long before the International Military Tribunal passes its verdict."[53] Many people don't remember that the Soviet Union was as anti-Semitic as Germany, possibly because

the Soviets did not lose a war and were not put on trial for all the world to see. Despite their authoritarian system of justice, they were still allowed to sit on the court that tried the Japanese war criminals.[54] This must have seemed like a slap in the face to the Japanese.

The trial was probably satisfying for the U.S. more than any other country at the Tribunal, with the exception of China. It had been almost exclusively the effort of the U.S. which pushed the Japanese back to their homeland with the rallying cry "Remember Pearl Harbor!" but the Americans were also guilty of war crimes, if the same rules that applied to the Japanese applied to everyone.

The Tribunal had charged the Japanese with the slaughter of innocent civilians and many horrors were documented during the trial, but the Americans killed many civilians in the course of the war, too. During the war, bombing by the Americans was usually confined to military or industrial targets, ones that had a direct affect on the war. Late in the war, however, the strategy of the Americans became mass bombing by squadrons of the new bomber, the B-29 Superfortress. General Curtis LeMay, hoping to speed the end of the war, decided to fire-bomb Tokyo with incendiary bombs that would set the city on fire. That strategy was a success in that large parts of Tokyo were burned to the ground, but more lives were lost in those bombings than in the two atomic bombings and almost one million people were homeless.[55] Although damage to strategic points was achieved, thousands of innocent civilians were killed in those fires.

General LeMay's policy was a policy of "scorched earth," the very strategy the Allies were condemning at the trial.

The "scorched earth" policy was continued with the dropping of the two atomic bombs on Hiroshima and Nagasaki. The damage done to thousands of people is hard to estimate. At least 111,000 people died directly in those two blasts.[56] Thousands suffered the effects of radiation before they died miserably. Thousands more received enough radiation to make them sick, but not to kill them. They went on with their lives and many died later with cancer. Thousands of innocent people were maimed and killed. The effects of the bombs can be summed up by an entry in the diary of Professor Raisuke Shirabe of the Nagasaki Medical College:

> August 11. Two days have passed since the big bomb was dropped on us, and I still can find no explanation as to why people continue to die. Many of them have no visible injuries, yet most exhibit the same symptoms: bleeding from the gums, loss of appetite, fever, apathy, the beginning of loss of hair, bloody diarrhea--then death.[57]

The Americans justified their use of the atomic bombs by saying they were trying to end the war sooner, but that is no excuse. There certainly were no excuses for Japan. The Americans knew they were wrong, too. They censored all Japanese newspapers and magazines and would not let them print pictures of the damage that the bombs caused. Not until the end of the occupation were the pictures published in Japan.[58]

Those examples show that the Japanese were not alone in their alleged illegal acts. The idea that four nations that also behaved in the same manner as the Japanese were sitting in judgment of the Japanese was unjust and seemed to be a principle of Machiavellian politics. Once again Pal's definition of "aggressors" as the losing party fits the situation.

As the trial came to a close, it was obvious from the Tribunal's interpretation of international law and the evidence presented before it, the verdict would be "guilty" for most of the defendants. Seven were sentenced to death. Sixteen received life sentences. One received a twenty year sentence and another received a seven year sentence. Two defendants died during the proceedings and Dr. Okawa was deemed unfit for trial.[59]

There were several differing opinions in the Tribunal about the sentences handed out. In most cases there was at least one justice that wanted a more severe punishment, except in the case of a death sentence, and at least one that wanted a less severe sentence. The sentences were decided by majority vote. For an accused to be sentenced to death, only six of eleven votes were needed. In the cases where there was a death sentence, six of them were seven to four votes and one was six to five.[60] An issue as important as a death sentence should at least be decided by a vote of two thirds or more, which would mean eight votes in the case of eleven justices, and not merely a majority. In the case of Baron Koki Hirota, who was sentenced to death by a six to five vote, the Dutch justice, B.V. Roling,

thought he should have been acquitted and said, "A tribunal should be very careful in holding civil government officials responsible for the behavior of the army in the field."[61] Roling also thought Marquis Koichi Kido should have been acquitted instead of receiving a life sentence. Pal went so far as to say that he found all the defendants not guilty. His reasoning was that war was not made illegal by the Pact of Paris or by customary law and individuals should not be responsible for acts of state. He also cited the procedural deficiencies of the Tribunal as a factor in his opinion.[62] Henri Bernard, the French justice, also felt that there were faulty procedures and rules at the Tribunal and concluded, "A verdict reached by a tribunal after a defective procedure cannot be a valid one."[63] Several justices also questioned the absence of the emperor and thought he should have been indicted, also. So even the justices on the Tribunal had widely differing opinions on the charges and the sentences.

After viewing the preceding examples, the conclusion should be that the Japanese defendants did not receive a fair trial at the International Military Tribunal for the Far East. The composition of the justices on the Tribunal was not fair, and was biased in favor of the prosecution. The rules of the Tribunal, particularly regarding the admittance of evidence, were skewed to favor the prosecution, too. There were many Japanese who should have been on trial but were not for various reasons. Finally the defense was severely hampered by lack of time and manpower.

In the actual dispute over the law, the victors' views of international law were imposed on the Tribunal, and therefore on the defendants. The Pact of Paris was taken as creating international law when it really was just a contractual agreement between nations. There was no customary law that was developed by the nations of the world, which could be observed by the wars that were taking place, yet the prosecution and Tribunal asserted that there was customary law. Also, despite having no precedents, individuals were held responsible for carrying out acts of state. Lastly, since the Tribunal had the biased perception that there was international law outlawing Japan's actions, it felt that there was no practicing of ex post facto law.

The disagreement of whether or not any other nation committed war crimes was said to be of no importance, even though those nations sat on the bench at the Tribunal. There were acts that would have been construed as crimes if the Japanese had done them, but since they were committed by the winning side, they were accepted as necessary for victory. A greivous double standard was established by excluding other nations from the crimes they committed during the war.

What was touted as one of the most important trials in history ended up being a miscarriage of justice. The Japanese may have been guilty of some of the charges brought against them, but their punishment was more for revenge than for "the cause of peace and right notions of international law."

Notes

[1]Joseph Keenan, Crimes Against International Law (Washington, D.C.: Public Affairs P, 1950) 155.

[2]Keenan 157.

[3]Arnold Brackman, The Other Nuremburg (New York: William Morrow & Co, 1987) 92.

[4]Brackman 70.

[5]Keenan 40-41.

[6]Brackman 70.

[7]Philip Piccigallo, The Japanese on Trial (Austin, Texas: U Texas P, 1979) 29.

[8]Brackman 65-67,117.

[9]Brackman 64-67.

[10]U.S. Department of State, Trial of Japanese War Criminals (Washington, D.C.: United States Government Printing Office, 1946) 42.

[11]U.S. Department of State 43.

[12]Radhabinob Pal, Dissentient Judgment of Justice Radhabinob Pal (Calcutta, India: Sanyal & Co., 1953) 143-144.

[13]Pal 145.

[14]Pal 146-147.

[15]Pal 149.

[16]Pal 152.

[17]Pal 172.

[18]Brackman 112-113.

[19]Brackman 149.

[20]Brackman 147.

[21]Brackman 221.

[22]Brackman 222.

[23]Pal 140.

[24]Richard Minear, Victor's Justice (Princeton, New Jersey: Princeton UP, 1971) 88.

[25]Brackman 350-351.

[26]Brackman 50-51.

[27]Brackman 196-200.

[28]Brackman 85.

[29]Brackman 101-104.

[30]Piccigallo 4-5.

[31]Minear 45-46.

[32]U.S. Department of State 40.

[33]Pal 109.

[34]Pal 118.

[35]Richard Falk, Crimes of War (New York: Random House, 1971) 45-46.

[36]Pal 41.

[37]Pal 126-128.

[38]Pal 84.

[39]Public Papers and Addresses of FDR, 1939 Volume (New York: MacMillan, 1941) 512-524.

[40]Pal 53.

[41]Pal 86.

[42]Sheldon Glueck, War Criminals, Their Prosecution and Punishment (New York: Kraus Reprint Corp., 1944) 133-134.

[43]Hans Kelsen, Peace Through Law (Chapel Hill, North Carolina: U of North Carolina P, 1944) 86.

[44]Pal 86-88.

[45]Brackman 128-129.

[46]Brackman 131-132.

[47]John Appleman, Military Tribunals and International Crimes (Westport, Connecticut: Greenwood P, 1954) 260.

[48]Keenan 3-4.

[49]Pacific War Research Society, The Day Man Lost (Tokyo: Kodansha International, 1972) 299-300.

[50]Jacques Dalloz, The War in Indochina (Dublin, Ireland: Gill & MacMillan Ltd., 1987) 55-62.

[51]M.C. Ricklefs, A History of Modern Indonesia (Bloomington, Indiana: Indiana UP, 1981) 198-213.

[52]Minear 95-98.

[53]Brackman 298.

[54]Zbigniew Brzezinski, The Permanent Purge (Cambridge, Massachusetts: Harvard UP, 1956) 26-28.

[55]Hoito Edoin, The Night Tokyo Burned (New York: St. Martin's, 1987) 238.

[56]S. Woodburn Kirby, M.R. Roberts, and G.T. Wards, The War Against Japan, vol. 5 (London: McCorquodale & Co., 1969) 207-209.

[57]Frank Chinnock, Nagasaki: The Forgotten Bomb (New York: World Publishing, 1969) 286.

[58]Pal 704.

[59]Appleman 237-238.

[60]Brackman 382-383.

[61]Brackman 389.

[62]Pal 697-701.

[63]Piccigallo 29.

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